OOI HOCK LEONG v. REGINA

[A. Cr. J. (Spenser Wilkinson J.) September 13, 1955]

[Penang — Criminal Appeal No. 28 of 1955]

Penal Code, ss. 114 & 379 — Theft — Failure to produce report at the trial — Evidence Ordinance, 1950, ss. 114 & 165.

This was an appeal against the conviction of the appellant on a charge of theft. On appeal it was argued: (1) the report of the complainant to the Police ought to have been put in evidence and the failure to do this was fatal to the prosecution case; and (2) there was insufficient evidence of guilty knowledge on the part of the appellant.

Held: despite the fact that the complainant's report was not produced and that the conviction of the principal thief was not strictly proved, there was ample evidence upon which the learned Magistrate could find the appellant guilty and therefore there was no failure of justice in this case.

Semble: where a complainant has made a report to the Police the report must be produced as part of the prosecution case.

Cases referred to:—

(1) *Chin Khing Siong v. R.* (1952) M.L.J. 74.

(2) *Abu Bakar bin Haji Abdullah v. R.* (Penang — Criminal Appeal No. 32 of 1954 — unreported).

MAGISTRATE'S CRIMINAL APPEAL.

Lim Kean Siew for the appellant.

D. C. Jackson (Sr. Federal Counsel) for the respondent.

Spenser Wilkinson J.: — At the conclusion of the hearing of this appeal I intimated that the appeal would be dismissed and that I would give my reasons in writing later, which I now proceed to do.

The appellant was charged with the theft of a brief case or bag, contrary to section 379 of the Penal Code. The facts were that a person, whose name had not been disclosed, snatched a bag out of the hand of the complainant, Don Dias at about 1.15 p.m. on the 15th May, 1955 at Farquhar Street near the junction of Farquhar Street and Love Lane. The complainant describes the incident thus:—

"Someone snatched away my bag. That someone came in a trishaw. After snatching P. 1 (i.e. the bag) he ran to a trishaw behind me. I saw a trishaw passing me before the bag was snatched."

The complainant proceeded to chase the trishaw and, according to him, shouted out "Mata mata." A Police Constable who at about this time arrived at the junction of Farquhar Street and Pitt Street heard shouts of "Orang Samoon" and a trishaw being pointed out to him by some bystander he chased the trishaw on a bicycle. He shouted out to the trishaw man to stop. The trishaw pedaller, although he turned round five or six times, instead of stopping proceeded to pedal away as fast as he could, and entered King Street, where the passenger who had seized the bag jumped out of the trishaw and ran into a back lane leaving the bag in the trishaw.

The learned Magistrate relying, as I think rightly, upon section 114 of the Penal Code convicted the accused, who was the trishaw pedaller, of theft.

The first point taken on behalf of the appellant on the appeal was that although the complainant, Don Dias made a report at the Central Police Station his report was not put in evidence and he relied upon my decision in the case of *Chin Khing Siong v. Rex*[1] for the contention that the omission to produce the report was fatal to the prosecution case. In that case, however, the prosecution evidence was very vague, and the evidence of the complainant was the only evidence against the appellant. In those circumstances I held that the failure to produce the report was fatal, because the report in that case would have been decisive one way or the other as to whether the complainant's story should be believed. In the present case, however, as pointed out by the learned Deputy Public Prosecutor, the principal witness in the case was not the complainant but the Police Constable who had chased the trishaw. In my opinion, therefore, the failure to produce the report in this case, although it was in my opinion a very serious omission on the part of the prosecution was not fatal to the prosecution case.

I would like to take this opportunity of reiterating what I have said before that where a complainant has made a report to the Police the report must be produced as part of the prosecution case. In the case of *Abu Bakar bin Haji Abdullah v. Regina*[2] I said:—

"Many appeals would in my opinion be saved if Magistrates would exercise their powers under section 165 of the Evidence Ordinance and insist upon the production of Police reports where the evidence discloses that a complainant made a report to the Police."

Since that judgment was given I have had occasion to consider the wording of section 165 of the Evidence Ordinance and have held that that section, referring as it does only to "the Judge" and not to "the Court" as do many of the other sections, confined the operation of this section to a Judge of the High Court and did not apply to Magistrates' Courts. I am nevertheless of the opinion that a Magistrate has ample power, quite apart from that or any other section, to insist on the production by the prosecution of a report made by any witness before him. If a Magistrate indicates that in his opinion a report ought to be produced and the prosecution still fails to produce it the presumption under section 114 of the Evidence Ordinance will be so strong that the evidence of the witness in question will be discredited.

It should not in future be necessary for a Magistrate to have to insist on the production of any such report because reports at least, by complainants, should be put in by the prosecution in every case as a matter of course; and I can only express the hope that it will not be necessary again for me to consider on appeal the effect of the failure by the prosecution to tender a report which ought to have been tendered.

Another point taken on behalf of the appellant in this appeal was that there was insufficient evidence of guilty knowledge on the part of the accused. I think it was unfortunate that the prosecution did not prove the conviction of the actual thief, and I think they ought to have done so. Indeed I thought at first that the principal thief ought to have been called as a witness, but as I was informed that he had been sent to Telok Mas it might be said that he could not be produced as a witness without an amount of delay and expense which under the circumstances would be unreasonable.

After careful consideration of the evidence and after taking into account the fact that the complainant's report was not produced and that the conviction of the principal thief was not strictly proved I came to the conclusion that there remained ample evidence upon which the learned Magistrate could find as he did and there was no failure of justice, and I therefore dismissed the appeal.

Appeal dismissed.

Re SAW HOCK HO

[Cr. Rev. J. (Spenser Wilkinson J.) September 14, 1955]

[Penang — Criminal Revision No. 25 of 1955]

Road Traffic — Motor Vehicles (Driving Licences) Regulations, 1952 — Holder of a provisional driving licence driving a motor car without being under supervision of a person holding an appropriate driving licence and without "L" plates — Charges.

In this case the accused was charged as follows: "That you on 5.5.55 at 8.30 a.m. at junction of Green Lane and Glugor Road, Penang, being the holder of a provisional driving licence No. 73272, did drive motor car No. K. 3184 without being accompanied by a competent driver, and that you have thereby committed an offence under s. 3(1) of the Motor Vehicles (Driving Offences) Proclamation. 2nd: That you on the same date, time and place, being the holder of a provisional driving licence No. 73272, while driving motor car No. K. 3184 did fail to display the prescribed letter "L" on the front and at the back of the said vehicle and that you have thereby committed an offence under s.s. 14(2)(c) and 14(3) of the Motor Vehicles (Driving Licences) Regulations, L.N. 479/52."

The learned Magistrate convicted the accused. The matter was referred to the High Court for revision as the learned Magistrate found that he had exceeded his jurisdiction in fining the accused $250 on the first charge when the maximum prescribed for an offence under s. 3(1) of the Proclamation is $200.

Heid: The charge was wrongly drawn. As the offence in this case consisted in failure to comply with the conditions subject to which the provisional licence was issued, it was essential that it should be so charged.

The convictions were altered to convictions upon the amended charges under the Motor Vehicles (Driving Licences) Regulations, 1952, and the sentence was maintained.

CRIMINAL REVISION.

Spenser Wilkinson J. (after reading the charges as reproduced in the head notes continued): — The learned Magistrate requested me to revise the case on the ground that he had exceeded his jurisdiction in fining the accused $250 when the maximum provided for an offence under section 3(1) of the Proclamation is $200.

On perusing the record, however, I find that the fault lies in the charge, not in the sentence. Section 3 of the Motor Vehicles (Driving Offences) Proclamation deals with persons who drive motor vehicles without a licence; it has nothing to do with persons who commit offences whilst holding a provisional licence. Both charges in this case — and indeed in similar cases in Penang — are entirely wrongly drawn.

The whole question of charges of this kind having in the case been drawn to my attention I think it right to make an endeavour to clarify the position. When a person holding a provisional licence drives a motor car without having beside him a qualified driver and without having the proper "L" plates on his car he commits one or more offences under sub-regulation (3) of Regulation 14 of the Motor Vehicles (Driving Licences) Regulations, 1952. The wording of this Regulation constitutes such a departure from the previous Regulations on the same subject that it is no wonder the Police and Magistrates have become somewhat confused in respect of these offences which only too frequently have to be dealt with in the Courts. Regulation 14 in particular necessitates a charge of such complication in respect of simple and everyday offences that I can only express the hope that those responsible will take early steps to amend it. Regulation 14(1) provides for the issue of provisional driving licences. Regulation 14(2) in respect of motor cars provides that such a licence shall be granted subject to "the condition" (in the singular) that until the holder has passed his test he shall :—

(a) drive under the supervision of a driver fully licensed to drive that particular type of vehicle; and

(c) while the vehicle is being driven by him, clearly display "a distinguishing mark as in Form No. 6 in the Part I of the First Schedule.'